NO. [redacted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS T. COHEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FEB 10 1967

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WILLIAM P. COPPLE
United States Attorney

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Phoenix, Arizona

Attorneys for Appellee
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I

JURISDICTIONAL STATEMENT

The appellant Thomas T. Cohen was indicted by the Federal Grand Jury for the District of Arizona on February 27, 1963 [C. T. 74]. [1] The indictment contained 15 counts [R. T. 36, Proceedings on July 28, 1964]. [2] The appellant was arraigned and entered a plea of not guilty to all counts on December 30, 1963 [C. T. 74]. On January 25, 1964, appellant filed a motion to dismiss the indictment which was granted on July 28, 1964. It was further ordered that bail be continued for 60 days to allow the filing of a second

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[1] "C. T." refers to Clerk's Transcript of Record.

[2] "R. T." refers to Reporter's Transcript of Record.

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indictment [R. T. 63-64, Proceedings on July 28, 1964].

The second indictment was returned and filed on September 9, 1964. The indictment contained 12 counts. The first 11 counts alleged offenses under Title 18, United States Code, Section 1341, Mail Fraud. The last count alleged a violation of Title 18, United States Code, Section 1342, Using Fictitious Name to Effect a Mail Fraud. Appellant was arraigned and entered a plea of not guilty to all counts on October 6, 1964 [C. T. 197].

On October 22, 1964, appellant filed a motion to dismiss the indictment with prejudice [C. T. 197]. On December 14, 1964, the motion to dismiss was denied [C. T. 198].

Jury trial was commenced on March 9, 1965, before the Honorable Walter E. Craig, United States District Court Judge [C. T. 201]. On March 17, 1965, the jury returned a verdict of guilty on all eleven counts that went to the jury [C. T. 202].

On May 17, 1965, appellant's motions for arrest of judgment and for judgment of acquittal or in the alternative for new trial were denied [C. T. 203].

Appellant was sentenced to 2 years imprisonment on each count, said sentences to run concurrently. The sentence imposed was made subject to the provisions of Title 18, United States Code, Section 4208(a)(2), the Court recommending that the Board of Parole consider eligibility for parole in a period not to exceed one year [C. T. 203].

The jurisdiction of the District Court rests on Sections 1341, 1342, and 3231 of Title 18, United States Code. This Court

has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 1341 (Mail Fraud Statute) was applicable to the first eleven counts of the indictment and provides in pertinent part as follows:

> "Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 1342 (Fictitious Name) was applicable to Count Twelve and provides in pertinent part as follows:

> "Whoever for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or devise mentioned in Section 1341 of this Title . . . uses or assumes . . . any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any Post Office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

III

STATEMENT OF FACTS

In January, 1961, appellant arrived in Phoenix, Arizona, and began using the fictitious name of "Al Sherman". To complete the facade, he created a fictional past for Al Sherman [R. T. 857-1105]. He incorporated Elderdale Estates, his solely owned shell corporation [R. T. 43-44-50, 127, 148]. Through Elderdale Estates appellant purchased a total of 280 acres of land in Utah at $19.50 an acre [R. T. 115, 123]. Thereafter, appellant incorporated Land Lists, his solely owned shell corporation [R. T. 43-45, 51, 95]. Land Lists then purchased the land from Elderdale Estates at a price of $50.00 an acre [Exhibit 6, R. T. 113].

Appellant also used Land Lists to distribute the land to the public under the guise of a giveaway program which operated in two ways. The first method was to place boxes in Phoenix, Arizona markets for the market customers to participate in an alleged drawing for a quarter acre "free" lot in "Fabulous Elderdale Estates" [R. T. 170, 176, 183-184]. The second method utilized was to place a "free" land certificate in the Lucky Family Check Book, a book containing coupons to purchase merchandise from retail stores at a discount [R. T. 457-461]. The latter method operated primarily in Pocatello, Idaho, and Missoula, Montana [R. T. 436].

Although the appellant represented that the land would be given to winners of a legitimate drawing, there was no drawing. Every participating customer, was a "winner" [R. T. 113-117, 200, 579, 593].

Although the appellant represented that the lot was free, the "winner" actually purchased the lot through the guise of closing costs for transfer of title. Thus appellant collected approximately $100 for an acre of land he originally purchased for $19.50 [R. T. 207]. To complete the aura of legitimacy, appellant created a third solely owned corporationtitled Brokers Trust to collect the closing costs for transfer of title and filing of deeds [R. T. 51, 92]. Thus, the public thought that a separate escrow company was involved. The only thing that separated Land Lists and Brokers Trust was a flight of stairs from the second floor to the first [R. T. 105, 107, 198]. To facilitate financial transactions, appellant opened two checking accounts in the name of Brokers Trust. "D.

Ritter" was the only authorized signature on the checking accounts. This was a second fictitious name utilized by appellant [R. T. 231, 696].

Appellant employed men lacking prior experience to be escrow agents for Brokers Trust. The primary function of the escrow agent was to personally contact the public, tell them about the land, and secure the closing costs. To perform this function the defendant supplied the escrow agents with various documents including brochures on "Fabulous Elderdale Estates" [Defendant's Exhibit A, R. T. 944, 1146]. Appellant or other of his employees instructed the escrow agents to make certain representations to induce the public to accept the "free lot" and pay the closing costs [R. T. 194, 195, 233-235, 465-466, 473, 639-640].

In addition to the testimony of salesmen, twenty-one winners, each of a "free" lot, testified. Five winners either saw the appellant or heard the appellant make the false representations [R. T. 154, 286, 317, 324, 340, 356-360, 370, 381, 384, 396, 498, 523, 536, 547, 587, 602, 608, 645, 650, 657, 667].

These representations included the following:

1. The land was grazing land.

This representation was false as evidenced by testimony that the land was an undried mud flat which had formerly been the basin of the great Salt Lake. There is an unchanging layer of salt covering the land, the permanency of which was attested to by the fact that approximately one-quarter of the ill-fated Donner party perished in the area and their tracks are still visible [R. T. 797-

799]. The land is worthless for grazing livestock [R. T. 730]. The only vegetation possible is salt tolerant plants such as pickleweed, salt grass, greasewood and alkali sacaton [R. T. 730-731].

2. The land had been surveyed, staked out and marked.

This representation was false as evidenced by the testimony that the last survey in the area had been made by Gulf Oil in 1953 at the time of their drilling an oil well which proved to be a dry hole [R. T. 770-774].

3. Land List, Inc. planned a housing development.

This representation was false as evidenced by the fact that although the defendant's brochures regarding "Fabulous Elderdale Estates" stated that lots were for sale for $200, no lots had ever been sold. Appellant in his letter to the Better Business Bureau represented that "no other land is being sold" [Exhibit 88, R. T. 1098, 1146-1147]. In addition the very nature of the land proves that any development is unfeasible.

4. Water is available.

This representation was false as evidenced by the fact that potable water is totally unavailable on the land. The only well in the area had been drilled by the United States Department of Interior and abandoned in 1958 because the water was too brackish for even livestock [R. T. 733-734, 764-766].

5. There was a highway adjacent to the property and the individual lots were accessible by existing or soon to be built automobile roads.

This representation was false as evidenced by maps and

testimony offered which showed that there is no highway adjacent to the property owned by appellant [R. T. 1142]. The closest road to the land involved is an unimproved gravel road approximately seven and one-half miles away. There are absolutely no roads or trails on the land involved [R. T. 716-796]. The deeds granted to the land contained no restrictions or dedications for streets, roads, alleys or highways. As a result accessibility to individual lots would be available only by trespass over other lots [R. T. 679].

6. Electricity was available.

This representation was false as evidenced by the testimony that electricity was unavailable in the area and the estimated cost for bringing power to the land was $15,600.00 [R. T. 699-700].

7. Schools, churches and shopping facilities were available in the near-by towns of Pigeon and Lucin, Utah.

This representation was false as evidenced by the fact that Pigeon, Utah was not a town nor had it ever been a town. It was a railroad siding which consisted of two miles of a double set of railroad tracks [R. T. 721-722]. Lucin, Utah was also a railroad siding, which additionally had one building, being the home for the signal maintenance man employed by the Southern Pacific Railroad [R. T. 759-760].

8. Upon payment of the closing costs, the winner would receive a recorded deed.

This representation was false as evidenced by the fact that 400 deeds were unrecorded at the time appellant took flight (Exhibit 28, R. T. 229, 961].

In August, 1961, appellant told his employees that he was leaving on a business trip. He was expected to return. He did not. Appellant left Phoenix and a series of unpaid bills [R. T. 223, 226, 229, 961, 596]. After appellant took flight, employees and others borrowed enough money to file approximately 300 of the unrecorded deeds [R. T. 961, 268].

IV

ARGUMENT

A. DISMISSAL OF THE FIRST INDICTMENT WITH LEAVE TO RE-INDICT DOES NOT BAR A SECOND INDICTMENT FOR THE SAME OFFENSE.

From February 27, 1963, until November 8, 1963, appellant was in Federal custody in the Southern District of Florida on unrelated pending charges.

On February 27, 1963, the first mail fraud indictment in the instant case was returned in Phoenix, Arizona, and a bench warrant concurrently issued [C. T. 74]. The warrant was received by the United States Marshal for the Southern District of Florida on March 4, 1963, and executed by said Marshal on November 8, 1963 [C. T. 74]. On November 13, 1963, appellant posted bond in the instant case and was thereafter at liberty pending trial [C. T. 187]. On December 30, 1963, appellant was arraigned and entered a plea of not guilty. He filed a motion to dismiss for lack of speedy trial on January 25, 1964, and a hearing was held on

July 27 and 28, 1964 before the Honorable William C. Mathes, United States District Judge [C. T. 74-75]. At the hearing, Judge Mathes asked Government counsel "Do you have any statute of limitations problems", and whether the Government would re-indict and dismiss the first indictment. The Court stated: ". . . you represent to the Court that that will be done, I will deny this motion. But if you don't represent that it will be done, I will grant the motion." [R. T. 36-39, Proceedings on July 28, 1964]. Upon being pressed by appellant to either grant or deny the motion immediately, the Court dismissed the indictment for unnecessary delay pursuant to Rule 48 of the Federal Rules of Criminal Procedure and ordered that bail be continued for sixty days to allow the filing of a second indictment [R. T. 42, 63-64, Proceedings on July 28, 1964].

On September 9, 1964, the second indictment was returned, within the 60 days and consistent with the Court's order, and on October 6, 1964, appellant was arraigned and entered a plea of not guilty [C. T. 197]. Appellant filed a motion to dismiss with prejudice on October 22, 1964, and on December 14, 1964, the motion was denied for the reason that appellant had failed to disclose wherein he had been prejudiced and for the further reason that the prior order of dismissal was based upon the Government's failure to prosecute and did not bar a new indictment [C. T. 197-198]. Trial was set for (and did in fact commence on) March 9, 1965 [C. T. 199]. On December 23, 1964, appellant filed a notice of appeal from the December 14, 1964, denial of his motion to dismiss

with prejudice. Appellant did not perfect this appeal [C.T. 198]

Appellant does not complain of the six months delay between the second indictment and trial, rather he cites the eight and one-half month delay following the first indictment. Appellant's premise is that the dismissal of the first indictment with leave to re-indict was a bar to a second indictment for the same offense.

Rule 48 of the Federal Rules of Criminal Procedure:

> ". . . implements the constitutional guarantee of a speedy trial. See Pollard v. United States, supra, 352 U.S. 361 . . . but it goes further. As the committee note indicates, Rule 48(b) 'is a restatement of the inherent power of the Court to dismiss a case for want of prosecution,' and that power is not circumscribed by the Sixth Amendment."
>
> Mann v. United States, 304 F. 2d 394, 398, (D.C. Cir. 1962).

It is clear that the rights of the defendant are not to "preclude the rights of public justice".

Beavers v. Haubert, 198 U.S. 77, 87 (1905).

Therefore, "the right of a speedy trial is necessarily relative. It is consistent with delays and dependent upon circumstances." Beavers v. Haubert, supra, page 87.

> "' . . . the right to a speedy trial is not designed as a sword for the defendant's escape, but rather as a shield for his protection.' " United States v. Lustman, 258 F. 2d 475, 478 (2nd Cir. 1958).

When appellant filed his motion to dismiss the first indictment he cited the delay of eight months and his custody during this period, as the grounds for relief.

In a note on the right to a speedy trial, 57 Columbia Law Review (1957), it is stated that: "It appears thus far that the constitutional violation will seldom, if ever, be declared unless the delay lasts over a year." Page 852, Note 38. Thus it is clear that "speed in trying accused persons is not of itself primal or separate consideration. Justice both to the accused and the public is the prime consideration." Frankel v. Woodrough, 7 F. 2d 797 (8th Cir. 1925).

Even when a defendant did not request a speedy trial because he expected the indictment to be dismissed, this Court has held there was no violation of the constitutional guarantee of a speedy trial, which necessarily included the finding that a delay of two years was not arbitrary or oppressive.

Collins v. United States, 157 F. 2d 409 (9th Cir. 1906).

As stated in United States v. Ewell and Dennis, ___ U.S. ___, #29, Oct. Term, 1965 (February 23, 1966):

> "We cannot agree that the passage of 19 months between the original arrests and the hearings on the later indictments itself demonstrates a violation of the Sixth Amendment's guarantee of a speedy trial. This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the

possibilities that long delay will impair the ability of an accused to defend himself."

The oppressive incarceration referred to by the Supreme Court can only mean custody occasioned by the case wherein relief is sought. Appellant's custody did not arise from the instant case but was occasioned by unrelated charges pending in Florida. The warrant issued for the instant case was executed on November 8, 1963. Appellant posted bond and was released on November 13, 1963. Only six days of custody were occasioned by the instant case. Even assuming that the eight months custody on the pending Florida charges was invalid, this does not of itself constitute a violation of the right to speedy trial. As the Supreme Court stated " . . . there is every reason to expect the sentencing judge to take the invalid incarcerations into account in fashioning new sentences if appellees are again convicted." United States v. Ewell and Dennis, supra.

By his own statement, appellant was unaware of our indictment for eight months. Thus it did not cause any concern or anxiety to appellant.

Appellant did not complain that the delay caused unavailability of evidence, or unavailability of witnesses, or faultering memories of witnesses, or in any way impaired his right to a fair trial. "In the complete absence of any indication that the instant defendant was adversely affected in the preparation or prosecution of his defense by the lapse of time [3 years] in bringing this case to trial, we can see no ground for complaint by defendant on that

score." United States v. Holmes, 168 F.2d 888, 891 (3rd Cir. 1948).

See also Yeaman v. United States, 326 F.2d 273 (9th Cir. 1963).

All the foregoing factors were in existence at the time the motion to dismiss the first indictment was pending before District Court Judge William C. Mathes. A motion to dismiss an indictment based on unnecessary delay is addressed to the sound discretion of the trial court. Having in mind that appellant's complaint was passage of time and not prejudice to his defense, Judge Mathes chose to exercise his discretion with limitations. It is fundamental that a court having the power to act has the power to undo its act, therefore should a judge reverse an order of dismissal or effectively reverse an order, there is no longer a bar to a second prosecution for the same offense.

Robinson v. United States, 284 F.2d 775
(5th Cir. 1960);

Ex Parte Altman, 34 Fed. Supp. 106 (D. C. S. D. Cal.).

Although dismissing the first indictment for failure to prosecute, Judge Mathes clearly expressed particularly in his order continuing bail to allow re-indictment that the dismissal was without prejudice to re-indictment. Therefore, ". . . the accused cannot complain because a liberal application of the Rule 48(b) earned him temporary freedom, without according him full immunity from prosecution." Mann v. United States, supra, at 398.

B. FROM THE WHOLE RECORD IT APPEARS THAT THERE WAS NO PREJUDICIAL ERROR IN JURY INSTRUCTIONS.

1. FAILURE TO OBJECT FORECLOSES THE RIGHT TO REVIEW.

At the conference on jury instructions, appellant did not request an instruction on the right of an accused not to testify [R.T. 1284-1285]. During closing argument on behalf of the Government, appellant's counsel gave an informal handwritten note to the Court Clerk which stated "I want to approach the Bench for instruction. I think I forgot to ask for instruction that defendant doesn't have to take stand and can't be held against him, etc." [R.T. 1285]. Thereafter, the Court instructed the jury. The instructions thoroughly covered the presumption of innocence, reasonable doubt and the fact that "A defendant is not to be convicted on mere suspicion or conjecture." [R.T. 1260-1261].

The Court also stated that "The law does not impose upon a defendant the duty of producing any evidence, including his own testimony." [R.T. 1261]. At the conclusion of the instructions, Counsel were called to the Bench and, outside of the hearing of the jury, the Court asked "Does either Counsel have any further instructions to offer at this time?" Government Counsel asked "What was the statement you made about failure of the defendant to take the stand?" To which the Court replied "I tacked it on, that he didn't have to present any testimony, including his own testimony."

To which Counsel for appellant replied "All right." [R.T 1275].

After the bailiffs had been sworn and the jury had withdrawn from the courtroom to commence deliberations, appellant then withdrew his consent to the instruction and orally requested an instruction that "the defendant does not have to take the stand and that this fact cannot be held against him nor any inferences made thereto." [R.T. 1277-1278].

Rule 30 of the Federal Rules of Criminal Procedure provides in part that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. . . . " In the instant case appellant did not object to the instruction on the right of an accused not to testify and further, he specifically stated that it was "All right". In the absence of plain error appellant's failure to object has foreclosed the right to review.

> Phillips v. United States, 334 F. 2d 589 (9th Cir. 1964), cert. den. 379 U.S. 1002.

Failure to instruct on the right of an accused not to testify, is not reversible error in the absence of a request or objection.

> Pereira v. United States, 202 F. 2d 830 (5th Cir. 1953), aff'd 347 U.S. 1.

And as observed in United States v. Reiburn, 127 F. 2d 525 (2nd Cir. 1942):

> "An accused often does not wish this [defendant's failure to testify] to be even alluded to, believing that if the jury considers it at all they will inevitably use it

> against him. Be that as it may, it is abundantly well-settled that the failure to give the instruction when it is not asked for is not error; at least when adequate instructions are given as to reasonable doubt and a presumption of innocence."

In many instances the giving of such an instruction has been cited as error. The Courts have held to the contrary.

United States v. Garguilo, 310 F. 2d 249
(2nd Cir. 1962);
Lyons v. United States, 284 F. 2d 237
(D. C. Cir. 1960);
Windisch v. United States, 295 F. 2d 531
(5th Cir. 1961).

Thus it is clear that the lack of an instruction on the right of an accused not to testify is not in and of itself plain error.

2. APPELLANT MUST PROPERLY REQUEST INSTRUCTIONS.

Rule 30 of the Federal Rules of Criminal Procedure provides that "at the close of the evidence, or such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests." Appellant's only attempt at compliance with this rule was by the submission of an informal handwritten note during the Government's closing argument. It is proper for a Court to refuse to give instructions which were not handed to the

Court prior to argument of counsel.

United States v. Liss, 137 F. 2d 995 (2nd Cir. 1943), cert. den. 320 U.S. 773.

In addition, appellant's handwritten note was not, as phrased, a sufficient statement of the law. The Court can refuse to give an improperly stated instruction.

George v. United States, 125 F. 2d 559 (D. C. Cir. 1942).

3. BRUNO CASE NOT APPLICABLE.

Finally, in Langford v. United States, 178 F. 2d 49 (9th Cir. 1949), the prosecutor on two occasions in argument, directed the jury's attention to the defendant's failure to testify. Counsel for the accused had not requested an instruction on the right of the accused not to testify; but the District Court gave an instruction to this effect which was reviewed by this Court.

> "Unlike the instruction which was held to have been properly requested in Bruno v. United States, 308 U.S. 287 . . . , this one neglected to state, in so many words that the failure of the defendant to take the stand does not create any presumption against him, or that it should not enter into the discussions or deliberations of the jury."

Langford v. United States, supra, p. 54.

This Court further stated at page 55,

> "Had defendant saved the point by proper objection, the instruction given would not have cured the error. But again, when given an opportunity to make their objections to the charges given, before the jury retired, counsel for defendant stated none."

In the instant case, appellant requested no instruction on the right of an accused not to testify until he submitted an informal note, containing an insufficient statement of law, during Government counsel's closing argument. After the Court instructed that the defendant need produce no evidence nor need he testify appellant agreed to the instruction as given and did not object. In no regard did the prosecutor direct the jury's attention to appellant's failure to testify. Thus it is clear that just as in Langford v. United States, the circumstances distinguish our case from Bruno v. United States [3], and the verdict of the jury should be allowed to stand.

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[3] See also Footnote 2, Smith v. United States, 268 F. 2d 416 (9th Cir. 1959).

V

CONCLUSION

For the reasons stated the judgment of the District Court should be confirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jo Ann Dunne

JO ANN DUNNE

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/s/ Jo Ann Dunne

JO ANN DUNNE